Examined

1941

File No. S. Dur 5/44

Legal- DEPARTMENT

A - BRANCH

Subject:—

C.S. No. 62 of 1942

Shrinivas Shesho Deshpande — — Plff.

V/s.

The Provincial Government of Bombay — Deft.

Claim — Rs. 5

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File No. S. Dur. 5/44

Std. Sectt. Slip 24-B

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Dharwar.

For a declaration that the order of Government made in G. R., R. D., No. 3248/33, dated 3rd August 1935, directing the resumption by levy of full assessment of Paragana Watan lands at Laxmipur is illegal and *ultra vires*.

GOVERNMENT OF BOMBAY.

LEGAL DEPARTMENT.

Resolution No. 4445.

Bombay Castle, 24th June 1943.

Letter from the Collector of Dharwar, No. L.A.W 202 dated the 30th November 1942—

In the Court of the First Class Sub-Judge at Dharwar.

Civil Suit No. 62 of 1942.

Shrinivas Shesho Deshpande .. Plaintiff ;

versus

The Provincial Government of Bombay .. Defendant.

Claim—Rs. 5

Forwarding papers in the suit noted in the margin; and requesting sanction to its defence.

Endorsement by the Commissioner, Southern Division, No. L.S.T. 273, dated the 9th December 1942—Forwarding the above with his concurrence.

Memorandum to the District Government Pleader, Dharwar, No. 4444, dated the 24th June 1943—Forwarding a copy of the brief with its accompaniment in advance.

RESOLUTION.—The defence of the suit should be sanctioned on the lines of the accompanying brief.

By order of the Governor of Bombay,

Original.

P. N. MOOS,
Secretary to Government.

G. R., No. 4445, L. D., dated the 24th June 1943.

To

* The Revenue Department,
* The Commissioner, Southern Division,
* The Collector of Dharwar,
The District Government Pleader, Dharwar (with two copies of the brief).

*With a copy of the brief.

No. of 1943.

Copy forwarded for information and guidance to

Subdt. after issue
2 File in a new file

A·P·A

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DHARWAR CIVIL SUIT No. 62 OF 1942.

Chronological Statement of Facts.

This is a suit for a declaration that the order of Government made in Government Resolution, Revenue Department, No. 3248/33, dated 3rd August 1935, directing the resumption by levy of full assessment of Paragana Watan lands at Laxmipur, taluka Hangal, is illegal and *ultra vires* and for a permanent injunction restraining the defendant for collecting any amount in excess of Judi.

pp. 7 and 9 of file I.

2. Plaintiff is a sharer to the extent of 9 pies in the Paragana Watan of Laxmipur and some other villages in Hangal Taluka of which the Khatedar is one Subhaji Swamirao Deshpande. Plaintiff as such sharer and being in possession of Paragana Watan lands has to pay a yearly judi of Rs. 80-13-2. Plaintiff along with other sharers failed to pay the judi for 1933-34 to Government.

p. 11 do.

3. On 24th July 1934, plaintiff's statement was recorded before the Mamlatdar, Hangal. He admitted that he was in arrears to the extent of Rs. 80-13-2 and was helpless and stated that the Watan lands at Laxmipur in his possession and standing in his name might be resumed. Two other sharers likewise pleaded their inability to pay the arrears.

4. On 16th May 1935, Government by its resolution (Revenue Department) No. 3248/33, sanctioned the proposal made by the Collector of Dharwar for the resumption by levy of full assessment of the Paragana Watan lands at Samasgi, taluka Hangal, district Dharwar, standing in the names of the four defaulters including the plaintiff.

p. 1 of file III.

5. It was brought to the notice of Government that of the four defaulters only one owned as land at Samasgi, and that the lands held by the others were at Laxmipur. Government by its Resolution No. 3248/33, dated 3rd August 1935, directed in modification of the previous order referred to above, that the Paragana Watan lands at Samasgi and Laxmipur, taluka Hangal, standing in the names of the four defaulters named (including the plaintiff) should be resumed by levy of full assessment.

6. It seems that on 7th November 1938, the plaintiff along with two other defaulters mentioned above, submitted a petition praying that Government may be pleased to reconsider the above orders. As the defaulter Venkatesh Ganesh had paid up all his dues, he was considered eligible for a regrant of his Paragana Watan lands, but Government declined to reconsider the order of resumption passed in the case of the plaintiff and the other defaulters.

p. 19 of loose pp. file.

7. On 14th March 1941, plaintiff and Triyambak made a further representation to the Government through Mr. S. S. Kargudi, M.L.A., for restoration of their watan but on 29th May 1941 the Government in their (R.D.) letter No. 3248-F-33/8849 replied that the petitioners had ample time to pay their arrears and that their petition for restoration of Paragana Watan at Laxmipur resumed, could not be granted.

8. On 25th November 1941, plaintiff gave notice of suit under section 80, Civil Procedure Code, and instituted the present suit on 20th February 1942, praying for—

(*a*) a declaration that the orders of resumption made by Government in G. R., R. D., No. 3248/33, dated 3rd August 1935 are illegal and *ultra vires* ;

(*b*) a permanent injunction restraining defendants from collecting the amount in excess of judi ; and

(*c*) costs and other reliefs.

Grounds of Defence.

Jurisdiction.—The suit is barred under section 4 (*a*) paragraphs 1 and 3.

The claim relates to partial exemption from land revenue which is part of the property appertaining to a hereditary office recognised under Bom. Act III of 1874 within the meaning of paragraph 1; and in view of the definition of "hereditary office" contained Bom. Act III of 1874, section 4, the circumstance that services originally appertaining to the office have ceased to be demanded does not affect the position. The claim is clearly one against Government.

The suit falls under paragraph 3 because it seeks to avoid the order of the Provincial Government, which is *intra vires* and lawful.

2. *Limitation.*—The suit is barred under article 120 of the Limitation Act, 1908. The right to sue accrued to the plaintiff when the rights claimed in the suit were threatened with invasion by the Government Resolution of 3rd August 1935 (*see* Kodoth Ambu Nair *v.* Secretary of State, 26 Bom. L.R. 639 P.C.).

3. *Merits.*—All land is liable to payment of land revenue according to the provisions of the Bombay Land Revenue Code, 1879, except such as may be exempted under the provisions of any contract or grant. (Section 45 of the Code; *see* also Vinayak *v.* the Collector of Bombay, 26 Bom. 339). The plaintiff does not hold a sanad which would limit his liability to the amount of judi alone. It appears from the Alienation Register, however, that the land forms part of property in respect of which a Gordon Settlement Sanad was granted in 1888. The District Government Pleader should try to obtain a copy of the Sanad and produce it. The plaintiff's right to the exemption from land revenue on payment of judi was subject to the observance of the conditions of the sanad, and upon breach of any of these conditions the right can be put an end to. This is clear from the wording of the sanad itself and is not established by judicial decision. (*See* Narsingrao *v.* Secretary of State, 34 Bom.L.R. 453). One of these essential conditions is that the grantee shall render to Government the yearly dues specified in the sanad—namely the amount of the judi. The plaintiff failed to pay the dues in 1934, admitted his inability to pay and himself suggested resumption. As he had failed to pay the yearly dues, Government had the right to terminate the grant and to direct levy of full assessment under section 45 of the Bombay Land Revenue Code read with section 48. The Government Resolution in question is lawful and valid.

See the Standard Form at pp. 267-68, Phadnis's Watan Act, 5th Edition.

4. The plaintiff's contentions to the contrary may now be examined briefly. The first contention is that the watan cannot be resumed piece-meal. The sanad, it is true, related to all the paragana watan lands of the watan; and it can be said that breach of a condition of the sanad on the part of the holder any of these lands is a breach of the conditions of the sanad so as to entitle Government to adopt that course. It is open to Government to resume only that land the holder whereof has been guilty of the breach, if upon the circumstances of the case, it appears to Government that it would not be just or equitable to visit the consequences of his default upon the other holders. This follows from the sanad itself: (1) it clearly envisages that the property included therein may be held in distinct shares separately by different persons succeeding thereto, and (2) the duty to observe the conditions named is imposed upon the holders and their heirs.

5. It is next contended that the plaintiff did in fact commit no breach of the condition because in fact he did clear off the arrears before 3rd August 1935. Even though

the dues were paid in 1935 as alleged, the plaintiff cannot be deemed to have complied with the condition which required him to render to Government the fixed yearly dues specified. The sanad does not prescribe the date for payment of the money but it must be paid within a reasonable time after 1st of August when it becomes due. The plain intention seems to be that the dues should at least be paid within the year in which the liability arises. (*See* section 46 of the Contract Act, section 139, Bombay Land Revenue Code, 1879). The dues in question were those of the revenue year 1933-34 and not only did the plaintiff fail to pay it but also expressly stated that he was unable to pay. If he paid the money two years after—and when he had incurred liability in respect of the next two years as well —he cannot be said to have complied with the sanad. There is nothing to show that he communicated to Government the fact of the payment and he appears to have continued to be in arrear in 1938 and 1941.

6. It is next alleged that the right to levy full assessment is lost by waiver. Waiver is the abandonment of a legal

right: a person entitled to the benefit of a stipulation of a contract may waive it and allow the contract to proceed as though the stipulation did not exist, or that the right contingent upon the happening of any contingency, had not arisen (*see* Halsbury Laws of England, 2nd Ed., Vol. 13, pp. 207-208). But in this case Government directed resumption as soon as the breach came to its notice, and later, in answer to the plaintiff's petitions, reaffirmed this decision. There can be no room for the argument that Government has by its conduct waived the right which had accrued to it by reason of the plaintiff's breach, to direct resumption of the land by levy of full assessment.

7. The plea of estoppel is equally baseless. The rule is stated in section 115 of the Evidence Act, 1872. It only applies to matters of fact. Moreover there was no representation on the part of Government, nor did the plaintiff act on any such representations and thereby alter his position to his disadvantage.

8. For all these reasons, it should be urged that the suit fails and should be dismissed with costs.

7 29

S U I T S.

Dharwar.

For a declaration that the order of Government made in Government Resolution, Revenue Department, No.3248/33, dated 3rd August 1935, directing the resumption by levy of full assessment of paragana Watan lands at Laxmipur is illegal and ultra vires.

GOVERNMENT OF BOMBAY,
Legal Department,
Resolution, No. 1576
Bombay Castle. 25th February 1946.

Letter from the District Government Pleader, Dharwar,

Read Government Resolution, Legal Department, No. 4445, dated the 24th June 1943.

Letter from the District Government Pleader, Dharwar, No. 535, dated the 19th November 1945, stating that the suit noted in the margin was decided by the Civil Judge (Senior Division) at Hubli on 31st October 1945, when the following order was passed:-

In the Court of the First Class Subordinate Judge, at Dharwar.

Civil Suit No.62 of 1942.
(Civil Suit No.254 of 1944, C.J.(S.D.)Hubli)
Shrinivas Shesho Despande - Plaintiff;
Vs.
The Provincial Government of Bombay - Defendant.
Clain Rs. 5/-.

"The suit fails and is dismissed. The plaintiff to pay the defendant's costs", and forwarding uncertified copy of the judgment.

RESOLUTION:- The result of the suit is recorded.

By order of the Governor of Bombay,

Original.

R.M.Mehta,
Assistant Secretary to Government.

Issued 25/2

To

The Revenue Department,
The Commissioner, Southern Division,
The Collector of Dharwar.

Kc. 23.2.

Submitted after issue
File in S.DWR 5/44.

Corr. 26/2

A.S.R
26/2/44

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the Civil Judge, Senior Division,
Hubli.

L. C. Civil Suit No 252 of 44.

1. Shrinivas Shesho Deshapande, 50, brahmin school peon Hangal.

1. The Provincial Government of Bombay.

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Suit for the issue of a permanent injunction restraining the Government of Bombay from recovering the full assessment.

The plaint is based on the following allegations :-

(a) The plaintiff is a watandar of the Laxmipur Deshapande family. He owns a small fraction of the watan property and pays an annual judi of Rs 80/- or so to Government. He has all along been paying his share of judi quite regularly and without fail. However in 1934, owing to the complete failure of crops in the village he could not pay the Judi of that year.

(b) In about the same year correspondence was going on in the Revenue department regarding the steps to be taken against

Krishnaji Swamirao Deshapande, a member ~~xxx~~ of the watandar family of Sammasgi, another village in Hangal Taluka, for the recovery of the arrears of Judi due from him. Quite accidentally the plaintiff happened to be classed along with this Krishnaji in that body of 'continuous and contumacious defaulters' and the extreme penalty that was imposed upon Krishnaji was extended to the plaintiff also, without any enquiry.

(c) The order of the Government dated 3rd August 1935 resuming the Paragana watan lands of the plaintiff is not only illegal and against the tenor and the spirit of the Sanad issued to the ancestor of the plaintiff's family; but quite unwarranted even on merits.

(i) The Government, in the first place, have not reserved any right of resumption in the way in which they have done now. The action of the Government in extending the Government Resolution No. 3248/33 to the plaintiff is invalid in law inasmuch as it contravenes the fundamental principles of contract and it is governed and regulated by the terms of the Sanad. Unless and until therefore the plaintiff is held to be a continuous and contumacious defaulter and the Government are empowered to resume, by a proper and competent court, the Government cannot deprive him of the rights he has under the Sanad.

(ii) Secondly assuming for argument's sake that the Government are empowered to resumt the watan the plaintiff begs to submit that he has not violated any of the conditions subject to which the watan is said to be continued. In the plain language, plaintiff is not the defaulter in the sense in which that the term is employed in the Government Resolution No. 563 dated 10th July 1933 the first of its kind. It is only in 1934 that the plaintiff failed to pay the Judi for the first time and as a matter of fact, that was the last time also. It may also be mentioned in this connection that the plaintiff had cleared off alll his dues before 3rd August 1935 i.e the date on which the final order was passed

(d) The order of resumption was passed in 1935. The Government are, however, collecting only judi from the plaintiff. It is therefore submitted that that they have waived whatever rights they have under the Government Resolution in question and they are therefore estopped from enforcing the Government order.

(e) The order of the Government is illegal for another reason also. The responsibility of paying the judi rests on all the members of the watandar family. The Government are therefore, incompetent to resume the watan in piecemeal. They must either cancel the whole Sanad or realise the arrears from any of themembers who is ready and able to pay the judi.

(f) The cause of action arose on 24-11-1941 i.e on the day on which plaintiff was served with a notice to pay the amount. Notice under section 80 of C.P.C. has been delivered to the defendant.

2. The Government of Bombay contend as follows (Ex.17):-

(a) The suit is barred by section 4(a) of the Bombay Revenue Jurisdiction Act 1876.

(b) The suit is barred under Article 120 of Schedule I to the Limitation Act, 1908, as it is filed more than 6 years after Government had recorded the Government Resolution of 3rd August 1935, whereby the right now claimed by the plaintiff was invaded or denied and threatened with invasion. The allegation in para 5 of of the plaint is incorrect.

(c) The plaintiff is the sharer in the pargana watan ~~xhich~~ referred to and hold lands in respect of which he is liable to pay judi. He failed to pay the judi for the year; pleaded inability. The lands are part of the paraganas watan property held under Gorda Settlement Sanad and are held subject to the conditions of that Sanad. As the plaintiff committed a breach of the conditions as to due payment of the fixed yearly dues the lands became liable to resumption by levy of full assessment. Accordingly Government by the Government Resolution Revenue Department No.324

of 3rd August 1935 directed resumption thereof accordingly. The said resolution is intra vires and lawful.

(d) The allegations in the latter part of para 1 of the plaint are not correct.

(e) The allegations in para 2 of the plaint are denied. The contention that the Sanad empowers Government to enforce resumption only in cases of continuous and contumacious defaulters is not correct. It is denied that the plaintiff was not a defaulter.

(f) With reference to para 3 of the plaint, it is submitted that judi was collected from the plaintiff only till 1939-40 orders were issued for levy of full assessment and the levy will be made with effect from August 1935 The delay in that behalf was due to the fact that the plaintiff and others affected by the Government Resolution submitted petitions to this defendant. In any event the contention in para 3 of the plaint that this lapse of short period operates as a waiver or estoppel is misconceived.

(g) The allegation that this defendant is incompetent to resume the watan piecemeal is incorrect.

3. The following were framed in the case

1. Is the suit barred by section 4A of the Bombay Revenue Jurisdiction Act 1876 ?
2. Is the suit barred under Article 120 of Schedule 1 to the Limitation Act 1908 as contended by the deft ?
3. Has Government waived its right to levy full assessment upon the plaintiff's lands as alleged in para 3 of the plaint ? If so, is Government estopped from levying full assessment ?
4. Was plaintiff a defaulter in the payment of judi to the Government upon the lands held by him; if so, has he broken the terms of the Sanad issued under the Gordon settlement ?
5. If so, is Government entitled to resume the watan by levying full assessment over the lands ?
6. Is Government not entitled to resume the watan piecemeal as alleged in the plaint ?

7. Is plaintiff entitled to the declaration and injunction claimed ?

8. What decree should be passed ?

4. My findings are :-

1 :- Unnecessary.

2 :- Unnecessary.

3 :- Not proved.

4 :- Yes; yes.

5 :- Yes.

6 :- Is entitled.

7 :- No.

8 :- General issue.

Reasons.

5. The point for determination in this case is whether the condition in the Grant of paying judi w s broken.

6. Now in the connected suit No. 254 of 44 I have given reasons for holding that the plaintiff in that suit was entitled to the declaration which he had asked for and to the injunction. Copy of my judgment in that suit is annexed hereto.

7. The special contention raised in this suit is that the plaintiff by his statement dated 29-9-1934 had expressly broken the condition of paying fixed duty. His statement was in these terms :- " I have made payment only to the extent of Rs 5-7-0 with reference to the year 1933-1934. Rs 148-10-0 now falls due.....The amount is in arrears as I am unable to pay. I stated and submitted on 24-7-1934 that the lands may be resumed. But now I submit that I might be granted time till February 1935 and that the lands should not be resumed. If time cannot be extended the lands might be resumed".

8. To my mind, the admission that he was unable to pay to Government the amount in question and the suggestion made therein that the lands that the lands might be resumed amount to a breach of the condition of paying the amount every year.

9. In the result, the suit fails and is dismissed. The plaintiff to pay the defendant's costs.

31-10-45

Civil Judge, Senior Division.